Filed 9/30/03 Zenith Ins. Co. v. The County of Los Angeles CA2/3

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

ZENITH INSURANCE COMPANY, Plaintiff and Appellant, v. THE COUNTY OF LOS ANGELES, Defendant and Respondent.	B161011 (Los Angeles County Super. Ct. No. BS073651)

APPEAL from a judgment of the Superior Court of Los Angeles County, Dzintra Janavs, Judge. Affirmed.

Chernow and Lieb, Ward Skinner; Friedenthal, Cox & Herskovitz and Mark H. Herskovitz for Plaintiff and Appellant.

Michael H. Manning and Associates and Michael H. Manning for Defendant and Respondent.

Plaintiff and appellant Zenith Insurance Company (Zenith) appeals a judgment denying its motion for relief from the claims statutes. (Gov. Code, § 946.6.)[1]

Zenith sought relief from the claims statutes in order to proceed with an action against defendant and respondent County of Los Angeles (the County). The issue presented is whether the trial court abused its discretion in denying relief.

On this record, we perceive no abuse of discretion and affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

1. *Zenith mistakenly files a claim with the City of Los Angeles (the City) rather than the County.*

On March 1, 2001, Betty Beard (Beard), an employee of Telecare Corporation (Telecare), was injured while riding in a County owned van, which blew a tire and flipped over on the freeway. Zenith, as Telecare's workers' compensation carrier, expended sums on account on Beard's medical expenses. The six-month limitations period to file a claim would expire on September 1, 2001.

On August 8, 2001, some 24 days before the deadline, Zenith submitted a claim form to the City, in the mistaken belief that the City was the entity which owned the vehicle.

On September 10, 2001, the City denied the claim, stating: "The County of Los Angeles is a separate public entity and not part of the City of Los Angeles. (See enclosure for address.)"

On September 14, 2001, Zenith submitted a late claim form to the County, together with a cover letter.

On September 26, 2001, the County rejected the claim.

On October 5, 2001, Zenith filed an application with the County for leave to present a late claim. The County did not respond and on November 19, 2001, the late claim application was rejected by operation of law.

---

[1] All further statutory references are to the Government Code, unless otherwise indicated.

2. *Zenith's petition for relief from the claims requirements*.

On January 10, 2002, Zenith commenced this action by filing a petition for relief from the claims requirements. The supporting declaration of attorney Ward D. Skinner stated he inadvertently submitted the claim to the City rather than the County "based upon a mistaken belief as to the ownership of the vehicle in question, as well as, a misunderstanding of the relationship between the City of Los Angeles and the County of Los Angeles. [¶] It was also my belief that filing a claim against the City of Los Angeles which is a part of the County of Los Angeles would suffice as to any claims against the larger entity. My mistaken belief was clarified with the rejection of the original claim filed with the City of Los Angeles."

In opposition, the County contended Zenith had not shown the failure to present a proper claim was the product of mistake, inadvertence, surprise or excusable neglect. Instead, there was a total absence of diligence on the part of Zenith. Had its counsel made a simple telephone inquiry, he could have ascertained the proper defendant entity. Instead, Zenith's counsel merely assumed he had identified the appropriate entity. The County also emphasized that Zenith did not file its petition for relief until January 19, 2002, 10½ months after the accrual of the cause of action. Finally, the County argued that because Zenith had not made a prima facie showing of entitlement to relief, the County was not required to show any prejudice from the delay.

In its reply, Zenith argued it promptly filed a late claim application after the County rejected its claim, and thereafter promptly filed its relief petition. Further, its counsel's failure to make a telephone inquiry was excusable neglect within the meaning of Code of Civil Procedure section 473 (section 473). Further, by analogy to section 473, attorney Skinner's declaration of fault should be sufficient for granting relief.

3. *Trial court's ruling*.

On June 11, 2002, the matter came on for hearing. The trial court denied the petition, ruling: "Under section 946.6 it is not every mistake that will excuse a failure to timely file a claim. The determining factor is the reasonableness of the misconception. . . . [¶] Here, Petitioner has presented no evidence that its failure to file a claim within six months was the result of mistake or excusable neglect. There is no evidence what steps, if any, were taken by Zenith during the six-month period following the accident to determine who the owner of the vehicle was. It would have been easy for Zenith and/or its counsel to telephone the City to verify whether the vehicle was owned by the City. Upon discovering that the City did not own the vehicle, Petitioner could have conducted a further inquiry to determine the owner of the vehicle.

"In addition, in the Declaration submitted by counsel for Petitioner, counsel states '[f]rom the information I had in my possession, it was my understanding that the County of Los Angeles was also an employer of Betty Baird . . . . ' A reasonable person in the circumstances would have expected that a County employee would be riding in a County van instead of a City van. Counsel's belief that the City is a part of the County and therefore a claim to the City suffices as to the County, is not a justifiable mistake.

"The cases cited by Petitioner are distinguishable. In *Lawrence* [*v. State of California* (1985) 171 Cal.App.3d 242], the County took three months to respond to Petitioner's claim that it was the incorrect entity. Here, the rejection was sent reasonably about one month after the claim was received. More importantly, in *Lawrence*, detailed declarations were presented as to the investigation that was done to determine the owner of the property and there was evidence that County employees had informed the Petitioner that the claim should be filed with the County.

"In *Bettencourt* [*v. Los Rios Community College Dist*. (1986) 42 Cal.3d 270], the court noted the 'confusing nature of the state's system of higher education' and that Petitioner's uncontroverted declaration showed adequate cause for relief. Here, there is no showing that there is anything 'confusing' about who owns title to a vehicle. In fact, it is a simple determination, made routinely by lawyers and others. As already noted, there is also no evidence whatsoever of what Petitioner did for six months to determine who owned the van.

"Counsel has not demonstrated reasonable mistake or excusable neglect in not timely filing with the County.

"The Court need not reach the issues of whether Petitioner's claim was filed within a reasonable time period and whether the County would be prejudiced by an order granting leave to file a late claim.

"Belatedly, in its reply brief, Petitioner seeks relief pursuant to Code of Civil Procedure section 473. Apart from the fact that counsel's declaration does not adequately support section 473 relief, Petitioner cites no authority for the proposition that section 473 relief is available in cases like this where the issues are failure to file an administrative claim within six months and an application to file a late claim within a reasonable time."

Zenith filed a timely notice of appeal from the judgment denying its petition.

CONTENTIONS

Zenith contends: the plain language of section 946.6 provides for mandatory relief from the governmental claims deadline where delay in presentation is the result of mistake, surprise, inadvertence or excusable neglect; in reviewing this matter on appeal, all doubts or conflicts must be resolved in favor of Zenith, the party petitioning for relief, so as to allow the case to be heard on the merits; the public policy behind section 946.6 mandates the relief sought by Zenith; contrary to the stated basis of the trial court's ruling, the showing required of a petitioner seeking relief from the claims presentation provisions is the same as that required pursuant to section 473; and none of the County's

arguments in opposition to the relief sought is well taken as Zenith's counsel showed the requisite diligence.

DISCUSSION

1. *Statutory scheme.*

Section 946.6 provides in relevant part: "(a) If an application for leave to present a claim is denied or deemed to be denied pursuant to Section 911.6, a petition may be made to the court for an order relieving the petitioner from Section 945.4. . . . [¶] . . . [¶] (c) *The court shall relieve the petitioner from the requirements of Section 945.4 if the court finds* that the application to the board under Section 911.4 was made within a reasonable time not to exceed that specified in subdivision (b) of Section 911.4 and was denied or deemed denied pursuant to Section 911.6 *and that one or more of the following is applicable:* [¶] (1) *The failure to present the claim was through mistake, inadvertence, surprise, or excusable neglect* unless the public entity establishes that it would be prejudiced in the defense of the claim if the court relieves the petitioner from the requirements of Section 945.4. [¶] . . . [¶] (e) The court shall make an independent determination upon the petition. The determination shall be made upon the basis of the petition, any affidavits in support of or in opposition to the petition, and any additional evidence received at the hearing on the petition. [¶] (f) If the court makes an order relieving the petitioner from Section 945.4, suit on the cause of action to which the claim relates shall be filed with the court within 30 days thereafter." (§ 946.6, italics added.)

2. *Standard of appellate review.*

An order denying relief under section 946.6, which allows the trial court to excuse compliance with government tort claims procedural requirements when the failure to present a claim was through mistake, inadvertence, surprise or excusable neglect, is reviewed for an abuse of discretion. (*Hernandez v. Garcetti* (1998) 68 Cal.App.4th 675, 682.) Because the policy favoring trial on the merits is the primary policy underlying section 946.6, any doubts should be resolved in favor of granting relief, and a trial court decision denying relief is scrutinized more carefully than an order granting relief. (*Bettencourt v. Los Rios Community College Dist., supra,* 42 Cal.3d at p. 276.) An

" '[a]buse of discretion is shown where uncontradicted evidence or affidavits of the plaintiff establish adequate cause for relief.' " (*Spencer v. Merced County Office of Education* (1997) 59 Cal.App.4th 1429, 1436.)

3. *The reasonably prudent person standard*.

The "mere recital of mistake, inadvertence, surprise or excusable neglect is not sufficient to warrant relief. Relief on grounds of mistake, inadvertence, surprise or excusable neglect is available only on a showing that the claimant's failure to timely present a claim was reasonable when tested by the objective 'reasonably prudent person' standard. The definition of excusable neglect is defined as 'neglect that might have been the act or omission of a reasonably prudent person under the same or similar circumstances.' [Citation.]" (*Department of Water & Power v. Superior Court* (2000) 82 Cal.App.4th 1288, 1293.) In deciding whether the error in failing to timely file the tort claim is excusable, "the reviewing court looks to the nature of the mistake or neglect and whether counsel was otherwise diligent in investigating and pursuing the claim. [Citation.]" (*Id*. at p. 1294.)

4. *No abuse of discretion on this record*.

a. *Analysis*

On this record, we find no abuse of discretion. Guided by the reasonably prudent person standard, we conclude the trial court properly found counsel's mistake in submitting the claim to the City rather than the County did not constitute excusable neglect.

As indicated, the moving declaration of Zenith's counsel stated he inadvertently submitted the claim to the City rather than the County "based upon a mistaken belief as to the ownership of the vehicle in question, as well as, a misunderstanding of the relationship between the City of Los Angeles and the County of Los Angeles. [¶] It was also my belief that filing a claim against the City of Los Angeles which is a part of the County of Los Angeles would suffice as to any claims against the larger entity. My mistaken belief was clarified with the rejection of the original claim filed with the City of Los Angeles."

Counsel's moving declaration did not set forth what steps, if any, he took during the six-month period following the accident to determine ownership of the subject vehicle. As the trial court noted, "there is no showing that there is anything 'confusing' about who owns title to a vehicle. In fact, it is a simple determination, made routinely by lawyers and others."

Further, counsel's declaration was internally inconsistent. He stated, "From the information I had in my possession, it was my understanding that the County of Los Angeles was also an employer of Betty Baird, along with Telecare . . . ." As the trial court found, a reasonable person in the circumstances would have expected that a County employee would be riding in a County vehicle, not a City vehicle.

Counsel also asserted, "It was also my belief that filing a claim against the City of Los Angeles which a part of the County of Los Angeles would suffice as to any claims against the larger entity. My mistaken belief was clarified with the rejection of the original claim filed with the City of Los Angeles." As the trial court found, counsel's belief that the City is a part of the County and therefore a claim to the City suffices as to the County, is not a justifiable mistake. Although the City of Los Angeles is a part of the County of Los Angeles in the geographic sense, it is rudimentary that the City and County are discrete political entities.

In sum, the moving declaration failed to show that counsel was reasonably diligent in investigating ownership of the vehicle and in pursuing the claim. Counsel has no basis for inferring that the vehicle was owned by the City. Counsel simply assumed the vehicle was City property, and based on that assumption he submitted the claim to the City. In so doing, counsel did not act as a reasonably prudent person would under the same or similar circumstances. (*Department of Water & Power v. Superior Court, supra*, 82 Cal.App.4th at pp. 1293-1294.)

b. *Zenith's case citations distinguishable.*

Various cases cited by Zenith are unavailing. In *Kaslavage v. West Kern County Water Dist*. (1978) 84 Cal.App.3d 529, the plaintiff was injured when he dove from a pipe into a canal. An investigator began an investigation and learned that the canal was

controlled by the Buena Vista Water District. A claim was filed against the Buena Vista Water District. The plaintiff learned after the claim period expired that the pipe was owned by a different public entity than the entity which controlled the canal. The reviewing court found the failure to identify the second public entity which owned the pipe was excusable because plaintiff made a substantial investigation. (*Id*. at p. 536.) The investigator spent "part of two days in investigation, including an on-site inspection and a check of the official records of the assessor's office. He also questioned four different public agencies in an attempt to obtain information." (*Id*. at p. 535.)

Here, we find nothing in the record to indicate that Zenith or its counsel made any investigation whatsoever prior to submitting the claim to the City in the first instance.

Bettencourt v. Los Rios Community College Dist., supra, 42 Cal.3d 270, likewise is distinguishable. There, "plaintiffs' attorney made the erroneous assumption that employees of Sacramento City College were state employees. He failed to discover or remedy this error within the [then] 100-day limitation period. [¶] Counsel practiced law in Walnut Creek, which is approximately 75 miles from Sacramento. He . . . was not familiar with the Los Rios Community College District or Sacramento City College. Moreover, public higher education in California represents a sometimes confusing blend of state and local control and funding. For example, the Los Rios Community College District, like all community college districts, is overseen by the state Community College Board of Governors, whose members are appointed by the Governor. (Ed. Code, § 71000.) Accordingly, it would not have been unreasonable for counsel to assume that Sacramento City College was part of the statewide higher education system." (*Id.* at pp. 276-277.)

Here, however, there is no showing that there was anything "confusing" about who held title to the subject vehicle. Counsel simply failed to make the proper inquiry and assumed ownership lay with the City.

Finally, in *Lawrence v. State of California, supra,* 171 Cal.App.3d 242, the County of Orange took more than three months after receiving the claim to advise plaintiff's counsel that the site of the accident was actually under the jurisdiction and control of the State of California. (*Id*. at p. 244.) Here, the City advised Zenith about one month after receiving the claim that the County was the appropriate entity.

Moreover, in *Lawrence*, the plaintiff presented declarations setting forth the investigation that was done to determine the appropriate public entity. Specifically, plaintiff's counsel's secretary "was assigned the task of determining which public agency to present with the claim [citation]. [¶] She telephoned the sheriff's substation in south Orange County and was advised Dana Point was not an incorporated city and had no responsibility for sidewalk maintenance and that the area was under the control of the county. . . . [T]he secretary also contacted several other cities in the vicinity and was advised 'they were [all] part of the County.' She reported her findings to an attorney in the office who caused a claim to be filed with the County of Orange . . . ." (*Lawrence v. State of California, supra,* 171 Cal.App.3d at p. 244.)

In marked contrast here, to reiterate, there was no evidence to show any investigation was conducted to determine the appropriate public entity. Plaintiff's counsel simply assumed the City was the owner of the subject vehicle.

c. *Conclusion.*

In sum, the record amply supports the trial court's finding that "[c]ounsel has not demonstrated reasonable mistake or excusable neglect in not timely filing with the County." Because Zenith failed to establish any grounds for relief under section 946.6, the trial court properly exercised its discretion in denying the petition for relief from the claims requirements.

DISPOSITION

The judgment denying the petition for relief from the claims requirements is affirmed. The County shall recover its costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

KLEIN, P.J.

We concur:

KITCHING, J.

ALDRICH, J.